(8)

No. 91-122

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,

Petitioner,

v.

RENE ALBERTO RODRIGUEZ, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the First Circuit

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an arbitrary, capricious, or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983.

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INTEREST OF THE *AMICI*

The Washington Legal Foundation (WLF) is a national non-profit public interest law and policy center with more than 120,000 members throughout the United States. WLF engages in litigation and matters promoting the free enterprise system and the economic and civil liberties of individuals and businesses.

WLF has a record of longstanding interest and involvement regarding the issue of the constitutional

protections of individual property rights. In pursuit of its view that protection of property rights was of paramount concern to the Framers of the Constitution, WLF has filed briefs *amicus curiae* in many of the leading Supreme Court cases in the area. *See*, *e.g.*, *General Motors v. Romein*, No. 90-1390, *cert. granted*, 111 S. Ct. 2008 (May 13, 1991); *Yee v. Escondido*, No. 90-1947, *cert. granted*, 112 S. Ct. 294 (Oct. 15, 1991).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions.

Amici's brief will focus on an argument raised by Respondents in their brief in opposition to the petition for a writ of certiorari. Respondents argue that federalism concerns dictate that the Court exercise "caution and restraint" in this case, because the case "concerns a matter uniquely in the domain of a state's interest in its land development and environmental policies." Brief in Opposition at 26. *Amici* disagree with that premise. Although the Court no doubt should always act with caution in defining the contours of substantive due process rights, "federalism" concerns cut in favor of Petitioners, not Respondents. In defining the respective spheres of influence of national and local governments, the Founding Generation made clear that governments at *all* levels should be vigilant in protecting individuals and their property from arbitrary government power. Accordingly, this is a case in which the Founding Generation would have approved of federal courts stepping in to scrutinize carefully the local government actions at issue.

In light of this brief's focus on the role of federal courts in protecting property rights rather than on the merits of Petitioner's substantive due process claim, it brings to the attention of the Court issues that may not be brought to the Court's attention by any of the parties.

Although *amici* do not directly address the substantive due process issues raised in this case, *amici* fully support Petitioner's contention that the Constitution grants all citizens a substantive due process right not to be deprived of life, liberty, or property as a result of arbitrary, bad-faith government conduct, and that Petitioner's complaint states a claim for violation of that right.

Amici file this brief with the written consent of all parties.

STATEMENT OF THE CASE

In the interests of brevity, *amici* adopt by reference the Statement of the Case contained in Petitioner's brief.

In brief, this case arises out of a dispute over the development of a large residential and tourist project in the Commonwealth of Puerto Rico. Petitioner PFZ Properties, Inc. ("PFZ") filed a complaint in December of 1987 in the District Court for the District of Puerto Rico, alleging a violation of 42 U.S.C. § 1983. In an amended complaint filed in October 1988, PFZ alleged that the Respondents, Rene Rodriguez and a body known as the Regulations and Permits Authority of the Commonwealth of Puerto Rico, had violated PFZ's rights to procedural and substantive due process under the Fourteenth Amendment.

Upon the completion of discovery, the District Court granted a motion to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. PFZ filed a timely appeal. On March 18, 1991, the Court of Appeals for the First Circuit affirmed the dismissal.

On July 22, 1991, PFZ filed its petition for writ of certiorari with this Court. The Court granted PFZ's writ, limited to the issue of whether an arbitrary, capricious, or illegal denial of a construction permit to a developer by officials acting under color of state law is actionable under

42 U.S.C. § 1983 as a violation of substantive due process rights.

SUMMARY OF ARGUMENT

Federalism principles do not caution against recognition of the substantive due process right asserted by Petitioner. A review of the Founding Generation's development of the Constitution and republican form of government demonstrates that they viewed the balance and interplay between the federal and state governments as a means of enhancing individual rights, and not principally as a means of protecting state governments against encroachment by federal authorities.

The Founding Generation viewed the protection of property as a primary purpose of Government. The Constitution and our constitutional form of government were designed to protect property rights at both the state and federal level. Accordingly, the principles of federalism formulated by the Founding Generation specifically envision federal intervention into the type of case presented at bar.

ARGUMENT

I. THE FOUNDING GENERATION CREATED THE SYSTEM OF FEDERALISM TO ENSURE THE PROTECTION OF ESTABLISHED RIGHTS FROM INTRUSIVE GOVERNMENTAL INTERFERENCE. THE CONCEPT OF PROPERTY IS ONE OF THE NARROW CLASS OF CONSTITUTIONALLY PROTECTABLE RIGHTS RECOGNIZED BY THE FOUNDING GENERATION. ACCORDINGLY, THE PRINCIPLES OF FEDERALISM PERMIT THE INTERVENTION INTO "LOCAL" AFFAIRS FOR THE PROTECTION OF PROPERTY RIGHTS UNDER SUBSTANTIVE DUE PROCESS ANALYSIS.

The drafters of the Constitution adopted a form of government that contained two distinct and viable structures: a centralized national government and more localized, state-focused governments.

> The proposed constitution . . . is in strictness neither a national nor a federal constitution; but a composition of both. In its foundation it is federal, not national; in the sources from which the ordinary powers of the government are drawn, it is partly federal and partly national; in the operation of these powers, it is national, not federal; in the extent of them again, it is federal, not national; and finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.

The Federalist No. 39 (J. Cooke ed. 1961).[1]

The dual system of government "provides a double source of protection for the rights of [United States] citizens." Brennan, *State Constitutions and the Protection*

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[1]All references to *The Federalist* are to the J. Cooke edition.

of Individual Rights, 90 Harv. L. Rev. 489, 503 (1977), quoted in *Patsy v. Florida Int'l University*, 634 F.2d 900, 923 (5th Cir. 1981), *rev'd on other grounds*, 457 U.S. 496 (1982), and "provides a salutary check on governmental power." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 790 (1982) (O'Connor, J., dissenting).

The concept of federalism was born from the idea "that the general government is not to be charged with the whole power of making and administering laws. Its jurisdiction is limited to certain enumerated objects which concern all the members of the republic but which are not attained by the separate provisions of any. The subordinate governments . . . will retain their due authority and activity." *The Federalist* No. 14. When, however, the exercise of state authority impinges upon a historically established constitutionally protected right, the principles of federalism allow intervention into areas traditionally reserved to the states. *See*, *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 502 (1977) (plurality opinion). The protection of property rights qualifies as an area appropriate for federal government intervention.

A. This Distribution of Authority Between the Central and State Governments Was A Conscious Effort By the Founding Generation To Curb Governmental Excess.

A central concern of the debate between federalists and anti-federalists over the adoption of the Constitution was the impact the new republic would have on its citizens. Anti-federalists feared that the proposed governmental structure and size would lead to a passive population and ultimately to a class of leaders who were unfamiliar with the populous. The federalists, conversely, feared a tyranny by the majority, disruptive legislatures, and a lack of authoritative leaders. Shklar, *Publius and the Science of the Past*, 86 Yale L.J. 1286, 1287-1290 (1977). The common thread throughout these disparate views was the fear of the loss of rights. "To curb this evil, [the

Founding Generation] allocated governmental power between state and national authorities . . . ." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. at 790.

Moreover, the fear of legislative abuses caused the anti-federalists to demand the adoption of a declaration of rights. The federalists, led by Alexander Hamilton, believed that a bill of rights was not necessary "since the national government was limited to exercising expressly delegated powers. . . ." O'Brien, *The Framers' Muse on Republicanism, The Supreme Court, and Pragmatic Constitutional Interpretivism*, 8 Const. Commentaries 119, 131 (1991) (citing *The Federalist* No. 81). While initially opposing the idea of a bill of rights, James Madison became a champion of the adoption of a declaration of rights for the Constitution. He stated, "'If there was reason for restraining state government . . . there is like reason for restraining federal government.'" *Id.* at 135 (quoting Madison, *Amendments to the Constitution* (June 8, 1789), reprinted in 12 *The Papers of James Madison* at 206).

To Thomas Jefferson and others of the Founding Generation, the natural extension of the jealous protection of individual rights against government was "'the legal check which [the Bill of Rights] puts in the hands of the judiciary.'" *Id.* at 134 (quoting 14 *The Papers of Thomas Jefferson* 659 (1958)). The purpose of this "check" was to form "'an impenetrable bulwark against every assumption of power in the legislative or executive . . . [and] to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.'" *Id.* (quoting Madison, *Amendments to the Constitution* at 206-07).

In the case at bar, the inquiry on the issue of federalism is when can the federal arm of our system intervene in traditionally local affairs. In writing for the Court in *Younger v. Harris*, 401 U.S. 37 (1971), Justice Black succinctly spelled out the circumstances under which

federalism concerns would lead a federal court to refrain from interfering with the actions of a state government:

> [T]he notion of "comity," that is, a proper respect for state functions, [is] a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways. This, perhaps for the lack of a better and clearer way to describe it, is referred to by many as "Our Federalism," and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of "Our Federalism." The concept does not mean blind deference to "States' Rights" any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these causes. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44.

Under Justice Black's understanding, the principles of "Our Federalism" do not discourage intervention by the federal courts into state-law matters provided that they may do so without doing violence to state prerogatives. As argued *infra*, the instant case raises claims of state interference with individual rights considered so fundamental by the Founding Generation that federalism concerns do not counsel against federal court intervention.

B. The Significance of Property Rights to the Founding Generation and the Protection Afforded Those Rights in the Constitution Support, Under Federalism Principles, Federal Intervention in a Traditionally Local Matter.

Two amendments to the Constitution protect property rights: the Fifth Amendment ("No person shall be . . . deprived of life, liberty or property, without due process of law,") and the Fourteenth Amendment ("or shall any State deprive any person of life, liberty, or property, without due process of law . . . ").[2] In fact,

> For the Founding Generation . . . property [was] more than simply an imaginative or symbolic concept: it [was] the medium through which struggles between individual and collective goals [were] refracted. Protection of individual property rights cut across all parts of the political spectrum and advanced radically different visions of the values to be protected in American society.

Underkuffler, *On Property: An Essay*, 100 Yale L.J. 127, 128 (1990) (footnotes omitted).

The bundle of rights incident to property ownership, i.e., "the individual's right to unfettered possession, disposition and use of material . . . 'held a special place in [The Founding Era's] law, republican theory and society.'" *Id.* at 132 (quoting Nedelsky, *American Constitutionalism and The Paradox of Private Property*, in *Constitutionalism and Democracy*, 241, 252 n.19 (J. Elster & R. Slugsted eds. 1988).

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[2]Federal courts have not definitively decided whether the Fifth Amendment's or Fourteenth Amendment's Due Process Clause applies to the Commonwealth of Puerto Rico. *Torres v. Commonwealth of Puerto Rico*, 442 U.S. 465, 469 (1979); *Izquierdo Prieto v. Mercado Rosa*, 894 F.2d 467, 468 n.2 (1st Cir. 1990).

The protection of private property has long been inextricably linked to personal freedoms: "'[P]roperty was [the] inspiration for the idea of a private sphere of individual self-determination securely bound off from politics by law . . . Property could bear such a heavy and crucial ideological load because it was itself such a natural part of normative political imagination . . . '" *Id.* (quoting Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1626-27 (1988)). The Founding Generation firmly believed that "the '[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property.'" *Id.* at 134 (quoting 1 *The Records of The Federal Convention of 1787*, 302 (M. Farrand ed. 1911).[3] Madison flatly stated that "[g]overnment is instituted to protect property of every sort . . . ." *Id.* at 135 (quoting J. Madison, *Property*, in 6 *The Writings of James Madison*, 101 (G. Hunt ed. 1906)).

Undeniably, the primary source of protection of property interests rests with state and local governments. "Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property." *Moore*, 431 U.S. at 513 (Stevens, J., concurring). Yet, the U.S. Constitution also has an important role to play in protecting property rights:

> The holding in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 [(1926)], that a city could use its police power, not just to abate a specific use of property which proved offensive, but also create and implement a comprehensive plan for the use of land in the community, vastly diminished the rights of individual property owners. It did not, however, totally extinguish those rights. On the contrary, that case expressly recognized that the broad zoning power must be exercised within constitutional limits.

[3]James Madison noted that the interests of "[t]hose who hold, and those who are without property, have ever formed distinct interests in society." *The Federalist* 10, quoted in Underkuffler, *supra*, at 134.

Moore, 431 U.S. at 513-514.

If, in fact, the state regulation of property rights is constrained by substantive due process concerns, intervention by the federal courts in this type of matter adheres to the highest ideals of federalism: the protection of federal rights without unduly interfering with the legitimate interest of the locality.

Federal intervention into cases of this type could never constitute undue interference with state government affairs so long as federal courts apply a deferential standard of review, akin to the test applied in *Moore*: "[B]efore [a zoning] ordinance can be declared unconstitutional, [it must be shown to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." *Moore*, 431 U.S. at 514 (quoting *Euclid v. Ambler Realty Co.*, 272 U.S. at 395) (emphasis deleted). That standard of review also has been applied in the review of the denial of individual zoning applications. *See, e.g., Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (individual zoning decisions can violate substantive due process rights only if decision is irrational).[4]

Since the standard articulated in *Moore* and *Euclid* presumes both the constitutionality and the rationality of challenged local actions, intervention by federal courts does not upset the delicate balance of federalism. The articulated standard prevents a court from becoming a

[4]By referring to the "substantial relation" test, *amici* do not mean to imply that the review of property rights must proceed under this standard. On the contrary, *amici* would, under the appropriate circumstances, argue that the Court should re-examine its view of the fundamental nature of property rights in constitutional law. The instant case in its present posture, however, does not squarely present that issue.

"super zoning board" that supplants its judgment for that of local authorities. *See Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir.), *cert. denied*, 474 U.S. 845 (1985); *Smithfield Concerned Citizens v. Town of Smithfield*, 719 F. Supp. 75, 81 (D.R.I. 1989), *aff'd*, 907 F.2d 239 (1st Cir. 1990). "Thus, the relevant inquiry is not whether the claimant or the Court agrees with the legislative body's judgment; but, rather, whether the rationality of that judgment is 'at least debatable.' If it is, the requirements of due process are satisfied." *Smithfield Concerned Citizens*, 719 F. Supp. at 81.

In sum, any suggestion that the review of the instant case by the federal courts would offend principles of federalism simply is not warranted. While the protection of property rights historically has rested with state and local governments, the Founding Generation clearly contemplated that the federal courts would also play a major role in defending private property rights from state government intrusions.

CONCLUSION

Amici curiae Washington Legal Foundation and the Allied Educational Foundation respectfully request that the judgment of the First Circuit be reversed.

Respectfully submitted,

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